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PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2012

FEBRUARY 17, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1433]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1433) to protect private property rights, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
The Amendment	2
Purpose and Summary	6
Background and Need for the Legislation	6
Hearings	16
Committee Consideration	16
Committee Votes	16
Committee Oversight Findings	18
New Budget Authority and Tax Expenditures	18
Congressional Budget Office Cost Estimate	18
Performance Goals and Objectives	20
Advisory on Earmarks	20
Section-by-Section Analysis	20
Dissenting Views	25

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Protection Act of 2012".

SEC. 2. PROHIBITION ON EMINENT DOMAIN ABUSE BY STATES.

(a) IN GENERAL.—No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is used for economic development within 7 years after that exercise, if that State or political subdivision receives Federal economic development funds during any fiscal year in which the property is so used or intended to be used.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) OPPORTUNITY TO CURE VIOLATION.—A State or political subdivision shall not be ineligible for any Federal economic development funds under subsection (b) if such State or political subdivision returns all real property the taking of which was found by a court of competent jurisdiction to have constituted a violation of subsection (a) and replaces any other property destroyed and repairs any other property damaged as a result of such violation. In addition, the State must pay applicable penalties and interest to reattain eligibility.

SEC. 3. PROHIBITION ON EMINENT DOMAIN ABUSE BY THE FEDERAL GOVERNMENT.

The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain to be used for economic development.

SEC. 4. PRIVATE RIGHT OF ACTION.

(a) CAUSE OF ACTION.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may bring an action to enforce any provision of this Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. Any such property owner or tenant may also seek an appropriate relief through a preliminary injunction or a temporary restraining order.

(b) LIMITATION ON BRINGING ACTION.—An action brought by a property owner or tenant under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of such property owner or tenant, but shall not be brought later than seven years following the conclusion of any such proceedings.

(c) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act, the court shall allow a prevailing plaintiff a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 5. REPORTING OF VIOLATIONS TO ATTORNEY GENERAL.

(a) SUBMISSION OF REPORT TO ATTORNEY GENERAL.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may report a violation by the Federal Government, any authority of the Federal Government, State, or political subdivision of a State to the Attorney General.

(b) INVESTIGATION BY ATTORNEY GENERAL.—Upon receiving a report of an alleged violation, the Attorney General shall conduct an investigation to determine whether a violation exists.

(c) NOTIFICATION OF VIOLATION.—If the Attorney General concludes that a violation does exist, then the Attorney General shall notify the Federal Government, authority of the Federal Government, State, or political subdivision of a State that the Attorney General has determined that it is in violation of the Act. The notification shall further provide that the Federal Government, State, or political subdivision of a State has 90 days from the date of the notification to demonstrate to the Attorney General either that (1) it is not in violation of the Act or (2) that it has cured its violation by returning all real property the taking of which the Attorney General finds to have constituted a violation of the Act and replacing any other property destroyed and repairing any other property damaged as a result of such violation.

(d) ATTORNEY GENERAL'S BRINGING OF ACTION TO ENFORCE ACT.—If, at the end of the 90-day period described in subsection (c), the Attorney General determines that the Federal Government, authority of the Federal Government, State, or political subdivision of a State is still violating the Act or has not cured its violation as described in subsection (c), then the Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act. In such a case, the Attorney General shall intervene if it determines that intervention is necessary in order to enforce the Act. The Attorney General may file its lawsuit to enforce the Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. The Attorney General may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(e) LIMITATION ON BRINGING ACTION.—An action brought by the Attorney General under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of an owner or tenant who reports a violation of the Act to the Attorney General, but shall not be brought later than seven years following the conclusion of any such proceedings.

(f) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act brought by the Attorney General, the court shall, if the Attorney General is a prevailing plaintiff, award the Attorney General a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 6. NOTIFICATION BY ATTORNEY GENERAL.

(a) NOTIFICATION TO STATES AND POLITICAL SUBDIVISIONS.—

(1) Not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners and tenants under this Act.

(2) Not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

(b) NOTIFICATION TO PROPERTY OWNERS AND TENANTS.—Not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners and tenants under this Act.

SEC. 7. REPORTS.

(a) BY ATTORNEY GENERAL.—Not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate. The report shall—

(1) identify all private rights of action brought as a result of a State's or political subdivision's violation of this Act;

(2) identify all violations reported by property owners and tenants under section 5(c) of this Act;

(3) identify the percentage of minority residents compared to the surrounding nonminority residents and the median incomes of those impacted by a violation of this Act;

(4) identify all lawsuits brought by the Attorney General under section 5(d) of this Act;

(5) identify all States or political subdivisions that have lost Federal economic development funds as a result of a violation of this Act, as well as describe the type and amount of Federal economic development funds lost in each State or political subdivision and the Agency that is responsible for withholding such funds; and

(6) discuss all instances in which a State or political subdivision has cured a violation as described in section 2(c) of this Act.

(b) DUTY OF STATES.—Each State and local authority that is subject to a private right of action under this Act shall have the duty to report to the Attorney General such information with respect to such State and local authorities as the Attorney General needs to make the report required under subsection (a).

SEC. 8. SENSE OF CONGRESS REGARDING RURAL AMERICA.

(a) FINDINGS.—The Congress finds the following:

(1) The founders realized the fundamental importance of property rights when they codified the Takings Clause of the Fifth Amendment to the Constitution, which requires that private property shall not be taken "for public use, without just compensation".

(2) Rural lands are unique in that they are not traditionally considered high tax revenue-generating properties for State and local governments. In addition, farmland and forest land owners need to have long-term certainty regarding their property rights in order to make the investment decisions to commit land to these uses.

(3) Ownership rights in rural land are fundamental building blocks for our Nation's agriculture industry, which continues to be one of the most important economic sectors of our economy.

(4) In the wake of the Supreme Court's decision in Kelo v. City of New London, abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.

(b) SENSE OF CONGRESS.—It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas. Property rights are central to liberty in this country and to our economy. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. The taking of farmland and rural property will have a direct impact on existing irrigation and reclamation projects. Furthermore, the use of eminent domain to take rural private property for private commercial uses will force increasing numbers of activities from private property onto this Nation's public lands, including its National forests, National parks and wildlife refuges. This increase can overburden the infrastructure of these lands, reducing the enjoyment of such lands for all citizens. Americans should not have to fear the government's taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse.

SEC. 9. DEFINITIONS.

In this Act the following definitions apply:

(1) ECONOMIC DEVELOPMENT.—The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, except that such term shall not include—

(A) conveying private property—

(i) to public ownership, such as for a road, hospital, airport, or military base;

(ii) to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;

(iii) for use as a road or other right of way or means, open to the public for transportation, whether free or by toll; and

(iv) for use as an aqueduct, flood control facility, pipeline, or similar use;

(B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;

(C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;

(D) acquiring abandoned property;

(E) clearing defective chains of title;

(F) taking private property for use by a public utility; and

(G) redeveloping of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601(39)).

(2) FEDERAL ECONOMIC DEVELOPMENT FUNDS.—The term "Federal economic development funds" means any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

SEC. 10. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—The provisions of this Act are severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

(b) EFFECTIVE DATE.—This Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

SEC. 11. SENSE OF CONGRESS.

It is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

SEC. 12. BROAD CONSTRUCTION.

This Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

SEC. 13. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

SEC. 14. RELIGIOUS AND NONPROFIT ORGANIZATIONS.

(a) PROHIBITION ON STATES.—No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) PROHIBITION ON FEDERAL GOVERNMENT.—The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto.

SEC. 15. REPORT BY FEDERAL AGENCIES ON REGULATIONS AND PROCEDURES RELATING TO EMINENT DOMAIN.

Not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and pro-

cedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

SEC. 16. SENSE OF CONGRESS.

It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others.

SEC. 17. DISPROPORTIONATE IMPACT ON MINORITIES.

If the court determines that a violation of this Act has occurred, and that the violation has a disproportionately high impact on the poor or minorities, the Attorney General shall use reasonable efforts to locate and inform former owners and tenants of the violation and any remedies they may have.

Purpose and Summary

The Private Property Rights Protection Act prohibits state and local governments that receive Federal economic development funds from using eminent domain to transfer private property from one private owner to another for the purpose of economic development. Specifically, if a state or political subdivision of a state uses its eminent domain power to transfer private property to other private parties for economic development, the state is ineligible to receive Federal economic development funds for 2 fiscal years following a judicial determination that the law has been violated. Additionally, the bill prohibits the Federal Government from using eminent domain for economic development purposes. Thus, the bill preserves the constitutional protections for private property jeopardized by the Supreme Court's decision in *Kelo v. City of New London.* [1]

Background and Need for the Legislation

The Fifth Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, provides that "private property [shall not] be taken for public use, without just compensation." [2] In other words, the Fifth Amendment imposes two distinct conditions on the exercise of the power of eminent domain: (1) that the taking must be for "public use," and (2) that the owner must be paid "just compensation." As Justice O'Connor has explained, although the Takings Clause presumes that governments are given the authority to take property without an owner's consent, "the just compensation requirement spreads the cost of condemnations and thus 'prevents the public from loading upon one individual more than his just share of the burdens of government.'" [3] And, "the public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person." [4]

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[1] 545 U.S. 469 (2005).

[2] Additionally, as the Takings Clause is a prohibition, not an express grant of power, the use of eminent domain is further restricted by other limits on government power. For instance, the Federal Government may only exercise its power of eminent domain if it is necessary and proper for the execution of one of its enumerated powers. United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

[3] *Kelo,* 545 U.S. at 497 (O'Connor, J., dissenting) (quoting Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893)).

[4] *Id.*

Unfortunately, the *Kelo* decision effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment"[5] and thereby jeopardized the property rights of all Americans. The decision has been resoundingly criticized from all quarters. Indeed, in the wake of the *Kelo* decision, a resolution, H. Res. 340, expressing grave disapproval of the decision, was approved by the House of Representatives on June 30, 2005, by a vote of 365–33. Additionally, on November 3, 2005, 157 Democrats joined 218 of their Republican colleagues in the House to pass the Private Property Rights Protection Act,[6] by a 376 to 38 vote margin. Regrettably, the bill was not considered in the Senate. H.R. 1433 provides Congress with another chance to enact these important reforms and prevent eminent domain abuse by ending Federal monetary support for takings of property for private economic development.

A. PROPERTY RIGHTS ARE FUNDAMENTAL RIGHTS

The protection of private property rights lies at the foundation of American government. "The conviction that private property was essential for self-government and political liberty was long a central tenet of Anglo-American constitutionalism."[7] According to John Locke, whose writings were widely read and quoted in the latter half of the eighteenth century and highly influential with the Framers, "[t]he great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preserving of their Property."*[8] The Framers, who inherited this tradition, "were motivated in large part by the desire to establish safeguards for property. They felt that property rights and liberty were indissolubly linked."[9] James Madison asserted at the Constitutional Convention that "the primary objects of civil society are the security of property and public safety"[10] and, in the *Federalist Papers,* that "[g]overnment is instituted no less for the protection of property than of . . . individuals."[11] Thus, Madison believed that a government "which [even] indirectly violates [individuals'] property in their actual possessions, is not a pattern for the United States."[12]

Accordingly, although the word "property" does not appear in the Preamble of the Constitution,

> The *Federalist Papers* make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property, the whole preamble is about pro-

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[5] *Id.* at 494.
[6] H.R. 4128, 109th Cong.
[7] James W. Ely, Jr., "'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners," 2005 *CATO Sup. Ct. Rev.* 39, 40 (2005).
[8] John Locke, *Second Treatise* § 124 (emphasis added).
[9] Ely, *supra* note 7, at 40.
[10] 1 *The Records of the Federal Convention of 1787* at 147 (Max Farrand ed., 1937).
[11] *The Federalist* No. 54 (James Madison); *see also* James Madison, "Speech in the Virginia Constitutional Convention," *reprinted in James Madison: Writings* 824 (Jack N. Rakove ed., 1999) ("[T]he rights of persons, and the rights of property are the objects, for the protection of which Government was instituted. These rights cannot well be separated.").
[12] James Madison, *Property* (1792), *reprinted in James Madison:Writings* 515 (Jack N. Rakove ed., 1999).

tecting the citizens rights in property and property in rights.[13]

Indeed, according to John Adams, "[p]roperty must be secured or liberty cannot exist."[14]

The early Supreme Court recognized Americans' fundamental right to private property. In 1795, in an opinion authored by Justice William Paterson, who was a delegate to the Constitutional Convention, the Supreme Court declared, "possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is the primary object of the social compact."[15] Because, as Justice Story would later explain, "government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."[16]

More recent Supreme Court opinions continue to acknowledge the fundamental nature of property rights, recognizing that "[i]ndividual freedom finds tangible expression in property rights."[17] And that the "right to enjoy property without unlawful deprivation . . . is, in truth a personal right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."[18]

The sanctity and centrality of private property rights are thus ingrained in our constitutional design. Therefore, it is no accident that the Bill of Rights contains several interrelated rights, in addition to the Takings Clause, a fair reading of which anchors a variety of personal liberties on the protection of property rights: the prohibition on infringing people's right to keep and bear arms (Second Amendment); the prohibition on quartering soldiers on private property (Third Amendment); the prohibition on unreasonable searches and seizures of property (Fourth Amendment); the prohibition on depriving any person of life, liberty, or property without due process of law (Fifth Amendment); the right to trial by jury for controversies exceeding twenty dollars (Seventh Amendment); and the prohibition of excessive bails and fines (Eighth Amendment).[19]

B. PUBLIC USE AND *KELO V. CITY OF NEW LONDON*

Prior to *Kelo,* it was generally understood that the public use requirement "embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B."[20] As Justice Story observed, "[w]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held

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[13] Hon. Loren A. Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights,* 30 U. Rich. L. Rev. 1055, 1056 (1996).
[14] 6 John Adams, *The Works of John Adams* 280 (Charles Francis Adams, ed. 1850).
[15] Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795).
[16] Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).
[17] United States v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993)
[18] Lynch v. Household Finance, 405 U.S. 538, 552 (1972).
[19] *See* Bernard H. Siegan, *Property and Freedom* 20–21 (1997).
[20] *Kelo,* 545 U.S. at 510–11 (Thomas, J. dissenting) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

a constitutional exercise of legislative power in any state in the union."[21] Similarly, the distinguished jurist Thomas M. Cooley, in his landmark 1868 treatise, asserted, "[t]he public use implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of government to seize and appropriate it could exist for any other use."[22] And, the Supreme Court, in 1872, declared that "[t]he right of eminent domain nowhere justifies taking property for a private use."[23] Thus, although the public use requirement has traditionally allowed property to be taken for unambiguous public uses, such as for roads, schools, and courthouses, prior to *Kelo* it had been interpreted to prohibit the use of eminent domain for private-to-private transfers of property.

Under pre-*Kelo* Supreme Court precedent, there were generally three categories of takings that complied with the public use requirement. First, it was clear that the government could take land from its owner without his consent and transfer it to public ownership for use as a public road, a public hospital, or a military base.[24] Second, Supreme Court precedent recognized that a government could take private property from an owner without his consent and transfer it to private parties, referred to as common carriers, who would then make the property available for the general public's use, such as with a railroad, a public utility, or a stadium.[25] Third, and more controversially, the Supreme Court had interpreted the public use requirement to permit a government to take private property even though the property was subsequently put to private use in two cases in which the previous use of the property was determined to be harmful to the general public.[26]

The Supreme Court's decision in *Kelo* greatly weakened the public use requirement by adding a fourth category to this list by upholding the use of eminent domain to take an individual's private property and give it to another for purely private economic development purposes. As the Court described the reason for the City's taking of private property in *Kelo:* "the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation."[27] The Supreme Court held that the properties taken by the City were "[not] blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."[28] In fact, the Court held that it would not even look at the question of whether the area in question was in economic distress: "[the City's] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our def-

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[21] *Wilkinson,* 27 U.S. (2 Pet.) at 658.
[22] Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 531 (1868).
[23] Olcott v. The Supervisors, 83 U.S. (15 Wall.) 678, 694 (1872).
[24] *See, e.g.,* Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).
[25] *See, e.g.,* National Railroad Passenger Corporation v. Boston & Maine Corp., 503 U.S. 407 (1992); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).
[26] Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
[27] *Kelo,* 545 U.S. at 473.
[28] *Id.* at 475.

erence." [29] Thus, because the takings were part of "a 'carefully considered' development plan," [30] they were upheld as constitutional.

In reaching its determination that economic development constitutes a public use, the Court ripped the words "public use" right out of the Constitution. The Court determined that the words "public use" are synonymous with "public purpose" such that the Court was able to pronounce that "[t]he disposition of this case therefore turns on the question of whether the City's development plan serves a *public purpose.*" [31]

C. THE DISSENTING OPINIONS IN *KELO*

Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, and Justice Thomas in a separate dissent, vehemently criticized the majority opinion. In the words of Justice O'Connor, the majority opinion pronounced that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public." [32] In other words, according to Justice O'Connor, "the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure." [33] However, "[t]he Constitution's text . . . suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking." [34]

Justice Thomas decried that not only did the *Kelo* majority opinion ignore the original understanding of the public use requirement, but its holding that the courts should defer to the legislature's judgment as to what constitutes a public use was a far cry from the lack of deference given to legislatures when other constitutional rights are at issue:

> We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause. . . . The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with

[29] *Id.* at 483.
[30] *Id.* at 478.
[31] *Id.* at 480 (emphasis added).
[32] *Id.* at 494 (O'Connor, J., dissenting).
[33] *Id.* at 501.
[34] *Id.* at 510 (Thomas, J., dissenting).

> this Court's interpretation of the Constitution. *Though citizens are safe from the government in their homes, the homes themselves are not.* [35]

As Justice O'Connor pointed out, "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." [36] Moreover, as is discussed in the next section, the dissenting opinions predicted that the effects of the allowing takings for private economic development would fall most harshly on people of lower economic means, minorities, houses of worship, and farmers.

D. EMINENT DOMAIN ABUSE DISPROPORTIONATELY AFFECTS THE MOST VULNERABLE

The *Kelo* decision opened the door for virtually any property to be taken by eminent domain for economic development purposes. As Justices O'Connor and Thomas observed in their dissenting opinions in *Kelo,* eminent domain abuse falls disproportionately on the poor, minorities, and other groups that are likely to be politically weak. Thus, the beneficiaries of the *Kelo* decision, Justice O'Connor asserted, are "likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more." [37]

After *Kelo,* "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." [38] In fact, according to a 2007 study conducted by the Institute for Justice,

> Eminent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%). . . . Taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and significantly more of them live at or below the Federal poverty line.[39]

Other recent studies show that areas populated by the poor and minorities are far more likely to be targeted for condemnation than other neighborhoods.[40] These studies confirm Justice Thomas' strong statement in dissent that,

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[35] *Id.* at 518 (Thomas, J., dissenting) (citations omitted).
[36] *Id.* at 497 (O'Connor, J., dissenting).
[37] *Id.* at 505.
[38] *Id.* at 503.
[39] Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* at 6 (2007).
[40] *See, e.g.,* Dick Carpenter & John Ross, *Empire State Eminent Domain: Robin Hood in Reverse* (2010) (describing extensive use of eminent domain New York, especially against poor and minority neighborhoods); Dick Carpenter & John Ross, "Testing O'Connor and Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?," 46 *Urban Studies* 2447 (2009).

> Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages those citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak.[41]

The studies also confirm the concerns raised by the National Association for the Advancement of Colored People, the American Association for Retired Persons, and other non-profit organizations in their amicus brief to the Supreme Court in the *Kelo* case:

> Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly. Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development on those least able to bear it, exacting economic, psychic, political and social costs. . . .
>
> The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro removal. . . ."
>
> Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels, and office parks. For example, four siblings in their seventies and eighties were forced to leave their homes and Christmas tree farm to enable the city of Bristol, Connecticut to erect an industrial park. . . . Several African-American families in Canton, Mississippi were similarly forced to leave the homes they had lived in for over 60 years to clear land for a Nissan automobile plant.[42]

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[41] *Kelo,* 545 U.S. at 521–22 (Thomas, J., dissenting).

[42] Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057 at *3–*9.

Eminent domain abuse also tends to affect religious groups and their houses of worship and farmers and ranchers disproportionately. Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the Supreme Court in favor of for-profit, tax-generating businesses. As the Becket Fund for Religious Liberty wrote in its amicus brief in the *Kelo* case, "[r]eligious institutions will always be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes precisely because they are deemed to be 'beneficial and stabilizing influences in community life.'" [43]

In addition, many other charitable organizations will face similar threats because of their tax-exempt status. Indeed, several charitable organizations have faced condemnation threats in recent years to satisfy municipal appetite for more tax revenue.[44]

Additionally, according to the American Farmland Trust, "[w]ith so much farmland on the urban edge and near cities still in steep decline, ex-urban towns could be tempted by [the *Kelo*] ruling to make farmland available for subdivisions." [45] As the American Farm Bureau Federation has pointed out, "[a]s valuable as that land is to our members and to the rest of the country, however, it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government." [46] Thus, the *Kelo* decision threatens American farmers and ranchers "with the loss of productive farm and ranch land solely to allow someone else to put it to a different private use." [47] American farmers and ranchers need their private property rights protected "if they are to find economically feasible ways to use their land and remain in the agriculture business—the business of feeding the American populace." [48]

E. PRIVATE PROPERTY RIGHTS PROTECTION ACT

The Private Property Rights Protection Act protects property owners by restricting the ability of state and local governments to take private property for economic development purposes if they receive Federal economic development funds. Specifically, if a state or political subdivision of a state uses its eminent domain power

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[43] Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 2787141 at *3 (quoting Walz v. Comm'r, 397 U.S. 664, 673 (1970)).

[44] Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 278714l, at *11 n.22 (citing Sue Britt, "Moose Lodge Set for Court Fight; Group to Fight Home Depot Land Takeover," *Belleville News-Democrat* (Missouri), April 1, 2002, at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, Hudson, "American Legion Closer on Hall; City Wants Building to Demolish for Project," *Plain Dealer* (Cleveland), March 8, 2003, at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, "Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization?," *Tallahassee Democrat,* July 13, 2003, at Al (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, "Vote on Land Confiscation," *Daily Journal* (Illinois), October 6, 2004, at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center)).

[45] American Farmland Trust Policy Update (July 6, 2005).

[46] Brief Amici Curiae of the American Farm Bureau Federation et al., 2004 WL 2787138, at *2–*4.

[47] *Id.*

[48] *Id.*

to transfer private property to other private parties for economic development, the state or political subdivision is ineligible to receive Federal economic development funds for 2 fiscal years following a judicial determination that the law has been violated. Additionally, the bill prohibits the Federal Government from using eminent domain for economic development purposes.

The bill's key provisions are contained in sections 2(a) and 2(b). Section 2(a) sets out the state and local activities that the bill prohibits:

> No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State received Federal economic development funds during any fiscal year in which it does so.

And section 2(b) sets forth the consequence for a state or local government that violates section 2(a):

> A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated. . . .

In order to encourage state and local governments to return private property that is taken for economic development to the former private landowner, section 2(c) terminates the ineligibility period if the offending state or local government returns all real property the taking of which the courts determine violated section 2(a).

As the bill is intended to preserve the property rights protections jeopardized by the Supreme Court's decision in *Kelo,* its definition of "economic development" continues to allow the types of takings that have traditionally been considered appropriate public uses. Traditional public uses include those where the condemned land is actually "used" by the public, either by building a government-owned structure on it (such as a road or a bridge), or by constructing a privately owned facility that the owner is legally required to allow the general public to use, such as a public utility. The bill also includes express exceptions for the transfer of property to public ownership, and to common carriers and public utilities, and for related things like pipelines, and makes reasonable exceptions for the taking of land that is being used in a way that constitutes an immediate threat to public health and safety. Additionally, the bill makes exceptions for: the incidental use of a public property by a private entity, such as a retail establishment on the ground floor in a public property; the acquisition of abandoned property; and for clearing defective chains of title in which no one can be said to really own the property in the first place. However, while the bill does contain reasonable definitions and exceptions, it also includes a rule of construction that provides that its provisions shall be construed in favor of a broad protection of private property

rights, to the maximum extent permitted by the terms of the bill and the Constitution.

Although the Private Property Rights Protection Act does not directly overturn *Kelo,* it should largely eliminate economic development takings, if states and their political subdivisions elect to continue to receive Federal economic development funds. Congress' power to condition the use of Federal funds extends to prohibiting states and localities from receiving any Federal economic development funds for a specified period of time if such entities abuse their power of eminent domain, even if only state and local funds are used in that abuse of power. Such a broader prohibition is an appropriate use of Congress' spending power, as the Supreme Court has made clear that "Congress may attach conditions on the receipt of Federal funds . . . 'to further broad policy objectives by conditioning receipt of Federal moneys upon compliance by the recipient with Federal statutory and administrative directives.'"[49] Congress may attach such conditions to the receipt of Federal funds provided they are "in pursuit of 'the general welfare,'" related "to the Federal interest in particular national projects or programs," and that they are "unambiguous."[50]

The bill denies states or localities that abuse eminent domain all Federal economic development funds for a period of 2 years. There is a clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent: states or localities that have abused their eminent domain power by using "economic development" as an improper rationale for a taking should not be trusted with Federal taxpayer funds for other "economic development" projects which could themselves result in abusive takings of private property.

Furthermore, to ensure that any conditioning of the use of Federal funds is unambiguous, the bill includes a "notification" section that requires the Attorney General to compile a list of the Federal laws under which Federal economic development funds are distributed and communicate such list to each state and also make it available on the Internet. This will put states and localities on notice that if they receive any Federal funds under the listed Federal laws, they must refrain from abusing their power of eminent domain or risk losing such funds for a period of 2 years. Moreover, only the locality, and not the whole state, would lose its economic development funds if only the locality abuses its eminent domain powers.

Finally, the bill includes a provision providing that the legislation would not become effective until the start of the first fiscal year following the enactment of the legislation in order to provide states and localities with sufficient lead time within which to come into compliance with the legislation, and the legislation would not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

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[49] South Dakota v. Dole, 483 U.S. 203, 206 (1987) (upholding as constitutional legislation in which Congress provided that a state would lose 5% of its Federal transportation funds unless states mandated a drinking age of 21).

[50] *Id.* at 207–208.

Hearings

The Committee's Subcommittee on the Constitution held 1 day of hearings on H.R. 1433, on April 12, 2011. Testimony was received from Lori Ann Vendetti, a homeowner from Long Branch, N.J.; John Echeverria, Professor, Vermont Law School; and Dana Berliner, Senior Attorney, Institute for Justice.

Committee Consideration

On January 24, 2012, the Committee met in open session and ordered the bill H.R. 1433 favorably reported with an amendment, by a roll call vote of 23 to 5, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1433.

1. An amendment by Mr. Nadler to strike "public facility" from the public uses for which a governmental unit may exercise its power of eminent domain under the bill. Defeated 10 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
[Vacant]			
Total	10	18	

2. Motion to report H.R. 1433 favorably, as amended. Passed 23 to 5.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy			
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle			
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson, Jr.	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez			
Mr. Polis			
Total	23	5	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1433, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 14, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1433, the "Private Property Rights Protection Act of 2012."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Daniel Hoople (for Federal costs), who can be reached at 226–2860, and Melissa Merrell (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1433—Private Property Rights Protection Act of 2012.

As ordered reported by the House Committee on the Judiciary on January 24, 2012

H.R. 1433 would deny Federal economic development assistance to State or local governments that exercise the power of eminent domain for economic development purposes or to take property from a tax-exempt entity, such as a religious or nonprofit organization. (Eminent domain is the right to take private property for public use.) The bill also would prohibit Federal agencies from engaging in such practices. Private property owners would be given the right to bring legal actions seeking enforcement of those provisions, and the legislation would waive States' Constitutional immunity to such suits. Finally, H.R. 1433 would require the Attorney General to notify States and the public of how the legislation would affect individuals' property rights and to report to the Congress each year on private rights of action brought against State and local governments.

CBO estimates that implementing this legislation would have no significant net effect on discretionary spending over the next five years. CBO estimates that additional reporting requirements by the Attorney General would cost less than $500,000 over the next five years, assuming appropriation of the necessary amounts. Enacting H.R. 1433 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1433 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) but would impose significant new conditions on the receipt of Federal economic development assistance by State and local governments. (Such conditions are not considered mandates under UMRA.) Because those conditions would apply to a large pool of funds, the bill effectively would restrict the use of eminent domain by State and local governments and would limit the ability of local governments to manage land use in their jurisdictions. Further, State and local governments could incur significant legal expenses to respond to private legal actions authorized by the bill.

CBO expects that few State and local governments would receive reduced Federal assistance under the bill. Under current law, the Federal Government provides economic development assistance through several sources, including programs of the Departments of Agriculture, Health and Human Services, and Housing and Urban

Development; the Economic Development Administration; and various regional commissions. CBO expects that most jurisdictions would not risk this assistance by exercising the use of eminent domain in situations described by the bill. Furthermore, the bill provides several exceptions where the use of eminent domain would not result in a reduction in Federal assistance, including takings for public use, for public rights of way, to acquire abandoned property, and to remove immediate threats to public health and safety. Given existing State laws that restrict powers of eminent domain and based on the historical use of such power, CBO expects that the use of eminent domain for purposes that would not meet any of the exceptions specified in the bill would be minimal.

State or local governments found to have exercised the power of eminent domain targeted by the bill would be ineligible for Federal economic development assistance for two years. In those cases, CBO expects that affected property would be returned or replaced (which would reinstate eligibility) or that Federal assistance would instead be provided to other eligible entities. Any change in the pace of Federal spending would be insignificant, CBO estimates.

The CBO staff contacts for this estimate are Daniel Hoople (for Federal costs) and Melissa Merrell (for the State and local impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1433 will preserve and protect private property rights.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1433 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title

Section 1 provides for the short title of the legislation, the "Private Property Rights Protection Act of 2012."

Section 2. Prohibition of eminent domain abuse by States

Section 2(a) prohibits States and political subdivisions of States (and any entity to which they have delegated the power of eminent domain) from exercising its power of eminent domain over property that is intended to be used for economic development or is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it the property is so used or intended to be used.

Section 2(b) provides that a violation of subsection (a) shall render a State or political subdivision ineligible for Federal eco-

nomic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated. Moreover, any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to a State or political subdivision shall be returned or reimbursed to the appropriate Federal agency or authority of the Federal Government, or component thereof.

Section 2(c) provides a State or political subdivision with the opportunity to cure a violation of subsection (a). A State or political subdivision can regain its eligibility to receive Federal economic development funds if it returns all real property the taking of which was found to have constituted a violation of subsection (a) and replaces any other property destroyed and repairs any other property damaged as a result of such violation. Additionally, if there are penalties or interest imposed by some other law for economic development takings, those penalties and interest must be paid in order for a violation to be cured.

Section 3. Prohibition on eminent domain abuse by the Federal Government

Section 3 provides that the Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain for economic development purposes.

Section 4. Private right of action

Section 4(a) provides that any private property owner or tenant who suffers injury as a result of a violation of any provision of this Act may bring an action in the appropriate Federal or State court. It further clarifies that a State is not entitled to sovereign immunity from any such action. Additionally, it provides that a property owner claiming a violation of this Act may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

Section 4(b) provides a 7-year statute of limitations from the conclusion of condemnation proceedings for actions brought pursuant to this Act. Section 4(c) provides that in any action or proceeding under this Act, the court shall allow prevailing plaintiffs reasonable attorneys' fees as part of the costs, and include expert fees as part of the attorneys' fees.

Section 5. Reporting of Violations to Attorney General

Section 5 provides that private property owners and tenants may report violations of the Act to the Attorney General and that the Attorney General shall investigate reports of such violations. Additionally, it provides that the Attorney General shall notify the Federal agency, or state or local government of an alleged violation and give the applicable governmental unit 90 days to show that it is either not in violation or that it has cured the violation. If after 90 days the Attorney General determines that the applicable governmental unit is still violating the Act or has not cured its violation, then the Attorney General is to bring suit to enforce the Act unless the owner or tenant has already brought such suit, in which case the Attorney General shall intervene if the Attorney General determines intervention is necessary to enforce the Act.

Section 6. Notification by Attorney General

Section 6(a) provides that not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners under this Act. It also provides that not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet website maintained by the United States Department of Justice.

Section 6(b) provides that not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners under this Act.

Section 7. Reports

Section 7(a) provides that not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate.

Section 7(b) requires each state and local authority that is subject to a private right of action under this Act to report to the Attorney General any information the Attorney General needs to make the report required by subsection (a).

Section 8. Sense of Congress regarding rural America

Section 8 contains findings and a Sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas.

Section 9. Definitions

Section 9 contains definitions of terms used in the Act. The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health. The term "economic development" does not include: (A) conveying private property to public ownership, such as for a road, hospital, or military base, or to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, or public facility, or for use as a right of way, aqueduct, pipeline, or similar use; (B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety; (C) leasing property to a private person or entity

that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building; (D) acquiring abandoned property; (E) clearing defective chains of title; and (F) taking private property for use by a public utility (the term "public utility" is intended to include all utilities providing electric, natural gas, telecommunications, water and wastewater services and other essential services, either directly to the public or indirectly through provision of such services at the wholesale level for resale to the public).

The term "Federal economic development funds" means any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

Section 10. Severability and effective date

Section 10(a) provides for a severability clause. Section 10(b) provides that this Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

Section 11. Sense of Congress

Section 11 states that it is the sense of the Congress that it is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

Section 12. Broad construction

Section 12 provides that the Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

Section 13. Limitation on Statutory Construction

Section 13 provides that nothing in the Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

Section 14. Religious and Nonprofit Organizations

Section 14 provides that no State or political subdivision of a State shall exercise its power of eminent domain over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so and makes States and political subdivisions ineligible for Federal economic development funds for a period of 2 years if they violate this prohibition. It further provides that the Federal Government or any authority thereof shall not exercise its power of eminent domain over property of such organizations by reason of their nonprofit or tax-exempt status.

Section 15. Report by Federal Agencies on Regulations and Procedures Relating to Eminent Domain

Section 15 provides that each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

Section 16. Sense of Congress

Section 16 provides that it is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina for economic development purposes or for the private use of others.

Section 17. Disproportionate Impact on Minorities

Section 17 provides that if a court determines that a violation of the Act has occurred and that the violation has a disproportionately high impact on the poor or minorities, the Attorney General shall use reasonable efforts to locate and inform former owners and tenants of the violation and any remedies they may have.

Dissenting Views

H.R. 1433, the "Private Property Rights Protection Act," has the laudable purpose of preventing the abuse of the power of eminent domain to benefit a private party at the expense of another private party. It does so, however, by imposing vague and inconsistent restrictions on state and local governments. As a result, jurisdictions will be unable to determine in advance what is prohibited, and therefore, how to avoid the bill's disastrous financial penalties.

H.R. 1433 falls short of its purpose by being both over- and under-inclusive. It would allow takings that have historically been abused to the detriment of property owners and vulnerable communities, while also potentially blocking worthwhile projects with clear public purposes and public benefits. The bill provides no remedy for an aggrieved property owner or tenant and offers no mechanism to prevent a prohibited taking from occurring. Instead, the legislation sets up a system where, if the property owner or tenant prevails, the jurisdiction would be subject to crushing penalties, while the aggrieved property owner gets nothing.

For these reasons, and those set out below, we respectfully dissent, and urge the House to reject this dangerously flawed legislation.

DESCRIPTION AND BACKGROUND

H.R. 1433, the "Private Property Rights Implementation Act of 2011," would restrict the use of eminent domain by states or political subdivisions. It would prohibit states and political subdivisions from exercising eminent domain for "economic development" if the jurisdiction receives Federal economic development funds during any fiscal year in which the property is used or intended to be used for economic development purposes. Persons whose property has been taken in violation of the Act, or tenants of that property, would have the right to sue the jurisdiction for temporary injunctive relief for a period of 7 years following the completion of the taking. A violation of the Act would result in the state or political subdivision's ineligibility for any Federal economic development funds for 2 fiscal years following a final ruling on the merits. A jurisdiction could cure the violation by returning the real property that was unlawfully taken, replacing any property that was destroyed, and repairing any damage.

A detailed section-by-section of the bill's substantive provisions follows:

Section 2 of the bill prohibits states and political subdivisions from exercising eminent domain for economic development, if such economic development occurs within 7 years following the exercise of eminent domain if Federal economic development funds are received by the jurisdiction during any fiscal year in which the property is used or intended to be used. A violation, if found by a court

of competent jurisdiction, would result in a state or political subdivision's ineligibility for any Federal economic development funds for 2 fiscal years following a final ruling on the merits. The appropriate Federal agency would withhold the funds and if a violation occurs after funds have been distributed, a state or political subdivision would reimburse the appropriate Federal agency. States and political subdivisions would not be ineligible for funds if a prohibited taking is cured by returning the real property that was unlawfully taken, replacing any property that was destroyed, and repairing any damage. An amendment by Representative Sheila Jackson Lee (D-TX), which was accepted by voice vote, added a requirement that the state must also pay unspecified applicable penalties and interest to retain eligibility for economic development funds.

Section 3 of the bill prohibits the Federal Government from exercising eminent domain for economic development.

Section 4 provides any private property owner or tenant who has suffered an injury as a result of a violation of the Act with a private right of action in the appropriate state or Federal court. A private property owner has 7 years following a state or political jurisdiction's taking of his or her property and using it in violation of this Act to bring an action. Prevailing plaintiffs are entitled to reasonable attorney's fees. Costs and expert fees are included as part of the attorney's fees.

Section 5 of the bill provides that a property owner or tenant who suffers an injury as a result may report the violation to the Attorney General (AG). The AG must conduct an investigation and if he or she finds a violation, the AG must notify the governmental entity of the violation. The governmental entity has 90 days to demonstrate that no violation has occurred, or to cure the violation by returning the property, rebuilding any property destroyed, and repairing any damage to the property. If not, the AG must commence an action, unless the property owner or tenant has already brought an action.

In addition, section 5 provides that the AG may only bring an action in the 7-year period beginning at the conclusion of the condemnation proceeding if, during that time, the property is used for economic development.

Section 6 of the bill gives the AG the responsibility for providing states with the text of the Act and a description of the rights of property owners under the Act no later than 30 days after the Act's enactment. The AG is also responsible for compiling an annual list of the Federal laws under which Federal economic funds are distributed and providing that list to states and posting that list on the Justice Department website no later than 120 days after the Act's enactment. Finally, the AG is responsible for publishing a notice containing the text of this Act and a description of rights of property owners under this Act in the Federal Register and on the Justice Department's website no later than 30 days after the date of the Act's enactment.

Section 7 of the bill requires the AG to provide an annual report to the House and Senate Judiciary Committees identifying states or political subdivisions that have used eminent domain in violation of the Act. The report must identify all private actions brought

as a result of a state or political subdivision's violation of this Act. In addition, the report must identify all states and political subdivisions that have lost Federal economic development funds as a result of a violation of the Act, as well as describe the type and amount of Federal economic development funds lost in each state or political subdivision and the Agency that is responsible for withholding such funds. Further, the report must identify violations reported to the AG, and actions brought by the AG. The report must discuss all instances in which a state or political subdivision has cured a violation of the Act. Finally, an amendment offered by Representative Jackson Lee, and adopted by a voice vote, added a requirement that the report must identify the percentage of minority residents compared to the surrounding nonminority residents, and include the median incomes of those impacted by a violation of the Act.

Section 8 of the bill expresses the Sense of the Congress that Congress should protect the property rights of Americans, including those who reside in rural areas.

Section 9 of the bill sets forth various definitions for terms used in the Act. It defines the term "economic development" as the taking of private property without the owner's consent and conveying or leasing that private property from one private owner to another private owner for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health. The definition explicitly excludes several types of takings:

- conveying of private property to public ownership, such as for a road, hospital, or military base;
- conveying private property to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, public utility, or public facility;
- removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;
- leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;
- acquiring abandoned property;
- clearing defective chains of title;
- taking private property for use by a public utility; and
- redeveloping a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act.

Section 9 also defines the term "Federal economic development funds" as funds administered to improve or increase a state or political subdivision's economy.

In addition, it provides that the term, "State," includes states, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

Section 10 of the bill provides that the provisions of the Act shall be severable. The section also provides that the Act takes effect upon the start of the first fiscal year following its enactment, but

that the Act does not apply to any projects for which condemnation proceedings have been initiated prior to the date of enactment.

Section 11 of the bill sets forth the Sense of the Congress to encourage and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

Sections 12 and 13 of the bill concern statutory construction. Section 12 requires that the Act be construed in favor of a broad protection of private property rights. Section 13 provides that nothing in this Act may be construed to supercede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Section 14 of the bill prohibits the states from exercising the power of eminent domain over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization.

Section 15 of the bill requires a report to the AG from each executive department and agency of all rules, regulations, and procedures and actions to bring them in compliance with the Act.

Section 16 of the bill expresses the Sense of the Congress that all precautions must be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina.

Representative Jackson Lee offered an amendment, adopted by a voice vote, that would require the Attorney General to use reasonable efforts to locate former owners and tenants of the violation and notify them of any remedies they may have if the court determines that a violation of the Act had occurred and that the violation had a disproportionate impact on the poor or minorities.

CONCERNS WITH H.R. 1433

I. THE PENALTY WILL FINANCIALLY CRIPPLE STATE AND LOCAL GOVERNMENTS AND PROVIDE NO RELIEF TO PROPERTY OWNERS

A. The bill's penalties will bankrupt states and localities

1. Loss of economic development funds for 2 years would devastate state and local budgets

Although the bill purports to define "Federal economic development funds," it nevertheless requires the Attorney General to "compile a list of the Federal laws under which Federal economic development funds are distributed."[1] The Government Accountability Office, however, testified about the difficulty of determining what qualifies as an "economic development program":

> Absent a common definition for economic development, we had previously developed a list of nine activities most often associated with economic development. These activities include planning and development strategies for job creation and retention, development, developing new markets for existing products, building infrastructure by constructing roads to attract industry to undeveloped areas, and estab-

[1] H.R. 1433 § 6(a)(2).

lishing business incubators to provide facilities for new business operations.[2]

For example, the U.S. Census Bureau reports that state and local governments received $63.9 billion from the Department of Transportation for fiscal year 2010, $30.3 billion of which was from the Highway Trust Fund.[3] States received more than $7 billion in Community Development Block Grants and $66 million for Empowerment Zones and other economic development from the Department of Housing and Urban Development.[4] States received more than $5 billion in capital programs from the Department of Housing and Urban Development.[5]

These are only a few examples of Federal funding that could be considered economic development funding.[6]

Whatever the actual total a state might receive, the loss of such funding for 2 years (or the requirement that a jurisdiction repay such funds) would necessarily be economically devastating.

2. Even if a jurisdiction never exercised the power of eminent domain for any reason, the effect on its borrowing power would be catastrophic

In light of the bill's potential to bankrupt a jurisdiction, there is a serious risk that a reasonable bond underwriter could never be confident that a jurisdiction would not, at some future point during the life of the bond, engage in a prohibited taking, or convert a property taken by eminent domain to a prohibited use. The penalties would necessarily affect the ability of the jurisdiction to repay the bond. A prudent underwriter would therefore have to take this possibility into account and charge a substantial risk premium to protect investors from the possibility that this legislation might, in the future, impair a jurisdiction's ability to repay. Moreover, a political subdivision would also be at risk that the state or county on which it is dependent for funding and services might incur the penalties, or that these units of government would face increased borrowing costs limiting their ability to aid a subdivision.

B. The bill is purely punitive, and fails to provide relief to aggrieved property owners

While the penalties imposed on states and localities by H.R. 1433 are substantial, it will not permit the plaintiff to stop the taking before it happens and it will not compensate the plaintiff other than what is already authorized under applicable law. The only re-

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[2] *Economic Development: Efficiency and Effectiveness of Fragmented Programs Are Unclear: Hearing Before the Subcomm. on Economic Development, Public Building, and Emergency Management of the H. Comm. on Transportation and Infrastructure,* 112th Cong. (2011) (prepared statement of William B. Shear, Director, Financial Markets and Community Investment, Government Accountability Office).

[3] United States Census Bureau, Federal Aid to States for Fiscal Year 2010 at viii (Sept. 2011).

[4] *Id.* at 10.

[5] *Id.* at 11.

[6] This statutory vagueness may nullify the bill's application to states and localities. The Supreme Court has long held that "when Congress attaches conditions to a State's acceptance of Federal funds, the conditions must be set out 'unambiguously,' '[L]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of Federal funds must accept them 'voluntarily and knowingly.' States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)) (citations omitted).

lief available is a "preliminary injunction or a temporary restraining order." [7] A prevailing plaintiff may also recover costs, including reasonable attorney's fees, and expert fees.[8] As a result, the bill would give a prevailing plaintiff only the satisfaction of having bankrupted the community.

During the markup, Representative Jerrold Nadler (D-NY) offered an amendment that would have allowed an owner or tenant to bring an action as soon as she "received notice of a final determination that an action to take such owner's property by eminent domain in violation of section 2 will proceed or . . . [i]f the property is used for economic development in violation of section 2 following the taking of that property by eminent domain." It would have permitted a prevailing plaintiff to "obtain appropriate declaratory, injunctive, or monetary relief to enforce any provision of this Act." The amendment would have prevented an unlawful taking and provided both permanent injunctive relief and any applicable damages. The amendment was rejected by voice vote.

II. THE PROHIBITIONS IN H.R. 1433 ARE VAGUE, AND ARE BOTH OVER INCLUSIVE AND UNDER INCLUSIVE

Abuses of the eminent domain power have not been confined to economic development projects. Public works, such as highways and other projects explicitly covered by this legislation, have also had a disproportionate impact on low-income and minority communities. As Robert Caro in his seminal work on urban political power, *The Power Broker,* observed:

> [D]uring the 7 years since the end of World War II, there had been evicted from their homes in New York City for public works . . . some 170,000 persons. . . . If the number of persons evicted for public works was eye-opening, so were certain of their characteristics. Their color for example. A remarkably high percentage of them were [African American] or Puerto Rican. Remarkably few of them were white. Although the 1950 census found that only 12 percent of the city's population was nonwhite, at least 37 percent of the evictees . . . and probably far more were nonwhite.[9]

Because the definition of a prohibited taking for economic development purposes explicitly exempts these types of public works, H.R. 1433 would allow many of these past abuses to continue with no restrictions.[10]

H.R. 1433 would also permit many projects where private property is taken and conveyed to another private party. For example, pipelines are exempt from the bill's prohibitions,[11] including the controversial Keystone Pipeline, which is planned to extend from Montana to Texas.[12] The company has already begun seeking to se-

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[7] H.R. 1433 § 4(b).
[8] H.R. 1433 § 4(c).
[9] Robert Caro, The Power Broker 967–8 (1974).
[10] H.R. 1433 § 9(1)(A)(I) permits "conveying private property to public ownership, such as for a road, hospital, airport, or military base."
[11] H.R. 1433 § 9(1)(A)(iv).
[12] According to the company website:

cure land along the right of way using eminent domain, even though the project has not yet received the necessary permits,[13] which has prompted action at the state and local level.[14]

Representative Mike Quigley (D-IL) offered an amendment requiring the completion of a public report by the relevant local environmental authority that has considered "the cumulative greenhouse gas emissions impacts of the pipeline over a 50-year time frame and whether existing pipeline capacity is adequate" and "the impacts of the project to minority and low-income populations" before eminent domain could move forward for this purpose. The amendment was rejected by voice vote.

The bill would also permit the use of eminent domain to seize private property and give it to a private developer for the purpose of constructing a sports stadium or shopping mall.[15] Localities have long used eminent domain to build stadia, including the city of Arlington, Texas, which exercised eminent domain to facilitate the construction of the stadium for the Texas Rangers in which George W. Bush was, at the time, a part owner.[16] Representative Nadler offered an amendment that would have dropped the term "public facility" from the list of exemptions to prevent such an eventuality, but it was rejected by a vote of 10–18.

III. H.R. 1433 IS AN ASSAULT ON STATES' RIGHTS

Since the *Kelo* decision, approximately 43 states have enacted some sort of legislation in response.[17] At least three state supreme courts have read the public purpose prong of their states' constitutions more narrowly than the Supreme Court has read the Takings Clause in the U.S. Constitution.[18]

Testifying before the Constitution Subcommittee, Professor John Echeverria of Vermont Law School explained that the legislation is unnecessary because nearly every state had enacted legislation in response to the *Kelo* decision. In his testimony, he provided a re-

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The proposed Keystone Gulf Coast Expansion Project is an approximate 2,673-kilometre (1,661-mile), 36-inch crude oil pipeline that would begin at Hardisty, Alberta and extend southeast through Saskatchewan, Montana, South Dakota and Nebraska. It would incorporate a portion of the Keystone Pipeline (Phase II) through Nebraska and Kansas to serve markets at Cushing, Oklahoma before continuing through Oklahoma to a delivery point near existing terminals in Nederland, Texas to serve the Port Arthur, Texas marketplace.

TransCanada Working with State of Nebraska and Department of State to Finalize New Route for Keystone XL through Nebraska, available at: http://www.transcanada.com/keystone.html (last visited Feb. 12, 2012).

[13] Leslie Kaufman & Dan Frosch, *Eminent Domain Fight Has a Canadian Twist,* N.Y. TIMES, Oct. 17, 2011, available at http://www.nytimes.com/2011/10/18/us/transcanada-in-eminent-domain-fight-over-pipeline.html?pagewanted=all.

[14] Michael Avok, *Nebraska Lawmakers Debate Pipeline Eminent Domain Rules,* Reuters, Nov 8, 2011, available at http://www.reuters.com/article/2011/11/09/us-usa-pipeline-nebraska-idUSTRE7A80MA20111109.

[15] H.R. 1433 § 9(1)(A)(ii).

[16] Frank James, *Texas Sports Plan Means Homes Will Have to Go: Some Feel Drop-kicked by Eminent Domain, Invoked to Obtain Land for a New Cowboys Stadium,* CHICAGO TRIB., July 18, 2005, available at http://articles.chicagotribune.com/2005-07-18/news/0507180187__1__eminent-domain-private-property-property-rights.

[17] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo,* 93 MINN. L. REV. 2100, 2101 (2009).

[18] Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006) (public use requirement in state constitution not met by economic development purpose); Board of County Comm'rs v. Lowery, 136 P.3d 639, 651 (Okla. 2006) (because state constitution places stricter limits on eminent domain than the Federal constitution, the state could not condemn easement for water pipelines to service private electric-generation plant, as that would be a taking for private use); Benson v. South Dakota, 710 N.W.2d 131, 146 (S.D. 2006) (dictum that state constitution does not recognize "public benefit" category and permits taking only for "use by the public").

view of the form that response has taken. He explained the importance of the use of eminent domain for public purposes, as contemplated by the Constitution, and urged that the Federal Government should not substitute its judgment for that of the states.[19]

While some may have believed, in the wake of the *Kelo* decision, that Federal action was necessary, at this point, states have responded, and Congress should not substitute its judgment for that of the states.

IV. THE PROPONENTS OF H.R. 1433 HAVE MISINTERPRETED THE *KELO* DECISION

In *Kelo,* the Supreme Court held that the municipality's use of eminent domain to implement its area redevelopment plan aimed at invigorating a depressed area was a "public use" within the meaning of the takings clause of the Fifth Amendment to the Constitution, even though some of the property would be turned over from private homeowners and business owners to private developers.[20] The majority opinion was grounded on a century of Supreme Court precedent holding that "public use" must be read broadly to mean "for a public purpose."[21]

In declining to rule that economic development does not qualify as a "public use," the Court nonetheless noted some limitations. "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[22] The Court also noted that the taking by New London was "executed pursuant to a 'carefully considered' development plan."[23]

The *Kelo* dissenters and the proponents of H.R. 1433, however, argue that even a broad reading of "public use" does not extend to private-to-private transfers solely to improve the tax base and create jobs.[24] For example, the dissent observed that the "most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[25] As Justice Thomas explained:

> Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best use, but are also the least politically powerful. If ever

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[19] *Private Property Rights Protection Act of 2011: Hearing on H.R. 1433 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary,* 112th Cong. (2012) at 32, n. 1. (testimony Professor John Echeverria).

[20] 545 U.S. at 474 (2005).

[21] *See, e.g.,* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (state's purpose of eliminating social and economic evils of a land oligopoly a public purpose); Berman v. Parker, 348 U.S. 26 (1954) (elimination of blight a public purpose); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (irrigation of arid land a public purpose).

[22] 545 U.S. at 477–8.

[23] *Id.* at 478.

[24] 545 U.S. at 506 (O'Connor, J., dissenting).

[25] *Id.* at 508 (Thomas, J., dissenting).

> there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.[26]

What the *Kelo* dissenters and the proponents of H.R. 1433 fail to acknowledge, however, is that the majority decision specifically excluded "extending the concept of public purpose to encompass any economically beneficial goal,"[27] and, more specifically stated that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."[28] Whatever the *Kelo* decision may stand for, it most certainly does not resemble the overwrought descriptions of it permitting the "State [to] replac[e] any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[29]

CONCLUSION

The power of eminent domain is subject to abuse and must be exercised with great care. We also recognize that the courts have a role in determining whether that power has been exercised for a genuinely public purpose rather than a mere pretext to confer a private benefit on another private party. The states have responded to the *Kelo* decision in the intervening years, and we do not believe that Congress should now substitute its own judgment for that of the states.

Even if we were to consider the restrictions in this legislation to be appropriate, the ruinous penalties imposed by the bill, and the significant economic disruption it would likely impose on state and local finances, would be disastrous and provide no actual benefit to aggrieved homeowners and tenants.

For these reasons, and those stated above, we respectfully dissent, and urge our colleagues to reject this harmful legislation.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.

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[26] *Id.* at 521 (citations omitted).
[27] *Id.*
[28] *Id.* at 478.
[29] *Id.* at 503.